

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
EASTERN DIVISION-RIVERSIDE

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HONORABLE JESUS G. BERNAL, DISTRICT JUDGE PRESIDING

— — —

REPORTER'S TRANSCRIPT OF MOTION PROCEEDINGS

Riverside, California

Monday, June 3, 2024

2:32 p.m.

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1 MONDAY, JUNE 3, 2024; RIVERSIDE, CALIFORNIA

2 -000-

3 THE CLERK: Calling Item 4 on the calendar, Case No.  
4 EDCR 23-21-JGB, United States of America v. Jason Edward Thomas  
5 Cardiff.

02:32

6 Counsel, please make your appearances.

7 MS. MAKAREWICZ: Good afternoon, Your Honor.

8 Assistant United States Valerie Makarewicz on behalf of the  
9 Government.

10 MR. SEBASTIAN: Good afternoon, Your Honor. Manu  
11 Sebastian from the Consumer Protection Branch at DOJ.

02:32

12 THE COURT: Good afternoon.

13 MS. POTASHNER: Good afternoon, Your Honor. Hilary  
14 Potashner on behalf of Mr. Cardiff.

15 MR. LARSON: Good afternoon, Your Honor. Stephen  
16 Larson also on behalf of Mr. Cardiff. Your Honor, we also have  
17 Stephen Cochell, who is Mr. Cardiff's civil attorney in the FTC  
18 case; Jonathan Gershon from our office; and my daughter, Mary  
19 Larson, who is interning with us this summer.

02:32

20 THE COURT: Good afternoon to you all.

02:33

21 The matter is on calendar on a motion made by the  
22 defendant for dismissal of the Indictment on several grounds,  
23 specifically the following grounds. So it's alleged in the  
24 motion that Mr. Cardiff's due process and Fourth Amendment  
25 rights were violated when the Government undertook a joint

02:33

1 civil and criminal investigation in bad faith and through  
2 primarily the receiver that was appointed in the civil case  
3 engaged in some conduct that would violate Mr. Cardiff's Fourth  
4 Amendment and due process rights. So there's a second ground  
5 for failing to preserve potentially exculpatory evidence.

02:34

6 Also, there's an allegation that there was fraud on the Court  
7 committed in the civil action and that there was pre-Indictment  
8 delay to the extent that it would prejudice the defendant in  
9 the criminal action.

10 So let's focus first, if we can, on the second ground  
11 that I mentioned, which is failing to preserve potentially  
12 exculpatory evidence.

02:34

13 So Ms. Potashner?

14 MS. POTASHNER: Thank you, Your Honor.

15 THE COURT: So is it your position, then, that the  
16 evidence we're talking about is potentially exculpatory, not  
17 actually exculpatory? As you know, there's a difference in the  
18 law as to how those two things are treated. So are you  
19 alleging that the evidence is definitely exculpatory so that  
20 bad faith is not an issue or are you saying that there were  
21 potentially exculpatory evidence that was destroyed which would  
22 require a finding of bad faith in order for the Indictment to  
23 be dismissed?

02:34

24 MS. POTASHNER: Your Honor, I believe that the Court  
25 has before it actually exculpatory evidence. I do think that

02:35

1 we could meet the standard of bad faith, but I don't think that  
2 Your Honor needs to go to that standard because I believe that  
3 it's actually exculpatory information. The reason I say that  
4 is there is evidence before Your Honor which is in the form of  
5 a declaration under oath from Mr. Cardiff explaining exactly  
6 what evidence was destroyed that he does not have access to  
7 anymore and exactly why that evidence would be exculpatory.

02:35

8 Conversely, the Government has proffered no evidence  
9 to rebut that. There is no contrary declaration submitted by  
10 the Government, no information undermining that assertion that  
11 was made under oath. So I believe that it's actual exculpatory  
12 evidence. I do note that the Government calls itself serving,  
13 but that is not evidence. That's an adjective and that's, you  
14 know -- that adjective has little meaning in this context.

02:35

15 Mr. Cardiff is in the best position to explain what  
16 evidence was there and what evidence is no longer there and why  
17 it would be exculpatory. Absent any contrary evidence  
18 proffered by the Government, by declaration or otherwise,  
19 there -- it's just -- it's not a fact in dispute.

02:36

20 THE COURT: Okay. So the evidence that we're talking  
21 about is -- at least a subset of that is the documents that  
22 were presumably destroyed at the receiver's direction, which  
23 were involved in the Google Suite or the computer imaging of  
24 the computers that were seized or copied from the premises of  
25 Redwood, correct?

02:36

1 MS. POTASHNER: That's partially the list. That is  
2 correct but not in total.

3 THE COURT: Right. So it's a subset of at least that  
4 information, correct?

5 MS. POTASHNER: Yes, Your Honor.

02:37

6 THE COURT: And so -- and the Government provides  
7 evidence that -- you know, substantially large amounts of  
8 documents were produced as a result of that imaging of that  
9 computer that was either seized or copied at the Redwood  
10 premises. Why wouldn't you be able to point me to a specific  
11 document that was produced by the Government that would be the  
12 sort of document that's exculpatory in nature that you feel  
13 there would be more of that was destroyed?

02:37

14 MS. POTASHNER: Well, Your Honor, I understand the  
15 Court's question, but if I could back up a little bit to talk  
16 about the evidence we're talking about because then I think I  
17 could answer that question more clearly.

02:37

18 The information that I think was electronically  
19 stored at some point and then destroyed was literally video  
20 images of customer phone calls, video and audio images of  
21 customer phone calls and audio image -- audio recordings of  
22 those same calls. So those -- those are now gone. There would  
23 be no -- no calls that I could point to in the Government's  
24 documentation that would substitute for those or demonstrate  
25 why those -- those audio and video recordings would be

02:38

02:38

1       exculpatory. They just -- they don't exist.

2           THE COURT: So those recordings of customer calls are  
3       not part of what the Government produced in the civil action or  
4       in this action. Is that what you're saying?

5           MS. POTASHNER: Correct. They're not -- they're in           02:38  
6       whole cloth not there or that we could not find them. The  
7       Government did offer a range of 13.5 million pages in order for  
8       us to search for them. We did our due diligence. We searched  
9       and searched and searched. They are not there. Unless the  
10      Government can point to a recording that somehow we've missed,    02:39  
11      they don't exist, and so they are now gone.

12           The second set of documents which are not there are  
13       documents that were physical notebooks, that were handwritten  
14       notebooks, notebooks that contained the records and information  
15       that were -- that was written down by employees and also by    02:39  
16      Mr. Cardiff himself.

17           THE COURT: So are you talking about the staff  
18       meeting handwritten logbooks or the customer sales log sheets  
19       or the handwritten notes?

20           MS. POTASHNER: All three, Your Honor.                   02:39

21           THE COURT: Okay.

22           MS. POTASHNER: And so those documents wouldn't have  
23       been electronically maintained in any computer system, so,  
24       therefore, a copy of them wouldn't have made their way to the  
25       Government. They were in the possession of the receiver. The    02:39

1 receiver took possession of Redwood and in taking possession of  
2 Redwood took possession of all the documents. There is  
3 absolutely no evidence that we could point to that would be  
4 like those -- those documents. And that's why we can't --

5 THE COURT: Do you have an idea what volume of 02:40  
6 documents we're talking about in those three categories?

7 MS. POTASHNER: If I may, Your Honor, speak to 02:40  
8 Mr. Cardiff?

9 THE COURT: You may.

10 (Counsel and Defendant Cardiff confer.) 02:40

11 MS. POTASHNER: Your Honor, there would be about 150 02:40  
12 to 200 notebooks.

13 THE COURT: Okay. Were any of these actually 02:41  
14 authored by Mr. Cardiff?

15 MS. POTASHNER: Yes, Your Honor. 02:41

16 THE COURT: Okay. So let's have the Government 02:41  
17 respond to those arguments at this time. Mr. Sebastian?

18 MR. SEBASTIAN: Yes, Your Honor. So in terms of the 02:41  
19 material that you just named, including the video recordings,  
20 handwritten notebooks, our understanding is that when the FTC  
21 and the receiver went in with the immediate access, there was  
22 material that was scanned, including handwritten notebooks.  
23 That material that the FTC collected was turned over to us, and  
24 we, in turn, turned it over to the defense.

25 In terms of video recordings and of the phone calls, 02:41

1 our understanding -- so the defense included this letter from  
2 Google showing that Google Suite's data was deleted and that  
3 this letter is a confirmation of that deletion, but we believe  
4 that's a misstatement because the statement states that the  
5 Government destroyed the data, and then Google confirmed that  
6 that data was destroyed. But, in fact, the letter reports that  
7 Google did not have material associated with three domains. 33  
8 other domains were located --

02:42

9 THE COURT: Go back a few words and tell me that  
10 again.

02:42

11 MR. SEBASTIAN: Sure. So the subpoena returned from  
12 Google confirms that 33 accounts were still in the Google  
13 account back when the return came in, and then three domains  
14 were not included. And only those three domains were missing.  
15 So Google doesn't confirm that it was destroyed, just that the  
16 material wasn't there.

02:42

17 Now, internal Redwood emails from March 2018 indicate  
18 that certain domains, like Redwood Sci, were never even  
19 included in the Google Suites account, and the defendant is  
20 familiar with that. These are his own documents, and these are  
21 his IT staff discussing that material when that material was  
22 supposed to be turned over to the FTC. Not only that, the  
23 defendant is saying under oath that he had recorded phone calls  
24 of what his employees were saying to consumers, but he was  
25 compelled by the district court to turn over all of that

02:42

02:43

1 material, and that material was not produced. So it was  
2 responsive to the CID, and it was --

3 THE COURT: That was before the receiver was  
4 appointed, I presume?

5 MR. SEBASTIAN: That's correct. And so if this 02:43  
6 material existed, it should have been turned over back in 2018.

7 THE COURT: How does that affect the analysis here,  
8 though? Is it relevant to whether or not the Government had  
9 it?

10 MR. SEBASTIAN: Well, there's a question as to its 02:43  
11 actual existence. So if it existed in 2017, it should have  
12 been turned over in response to the CID. And it wasn't turned  
13 over at that time as defense to the civil allegations.

14 THE COURT: So you're using that fact to argue that  
15 those documents do not, in fact, exist because if they did, 02:43  
16 they would have been turned over?

17 MR. SEBASTIAN: So the Government can't for sure say  
18 whether or not something existed or not. What we can say is  
19 whether or not it was turned over. And we don't see that  
20 material within the items that were turned over. And the 02:43  
21 evidence that's shown in terms of --

22 THE COURT: So when the receiver took over and went  
23 through Redwood, they found a lot of documents that had not  
24 been turned over, correct?

25 MR. SEBASTIAN: They did. They found material that 02:44

1 wasn't turned over. They found material --

2 THE COURT: That was part of the civil -- the  
3 district court problem with Mr. Cardiff, the fact that he was  
4 not complying with the request to turn over documents to the  
5 FTC?

02:44

6 MR. SEBASTIAN: That's correct. That's part of our  
7 charge conduct, Your Honor, because there's evidence that he  
8 was destroying material that was related to the CID and the  
9 order that was compelling him to produce this material.

10 THE COURT: So as to the category of documents which  
11 you believe were in your production, I think we talked about  
12 the logbooks; is that correct?

02:44

13 MR. SEBASTIAN: So everything that was turned over to  
14 us by the FTC and the receiver has been produced to the  
15 defendant.

02:44

16 THE COURT: Right. I understand that. But what  
17 categories in the categories that we just talked about do you  
18 believe are included in that production?

19 MR. SEBASTIAN: So in our response, we pointed out  
20 that there were notes that were collected, notes that were  
21 scanned, books that were scanned.

02:45

22 THE COURT: Right.

23 MR. SEBASTIAN: Those were turned over.

24 THE COURT: And did you review those notes for  
25 potentially exculpatory value --

02:45

1 MR. SEBASTIAN: So --

2 THE COURT: -- with regard to this motion?

3 MR. SEBASTIAN: -- the Government did review some of  
4 this material and has turned over all of that material.

5 THE COURT: I'm not saying whether you turned it over 02:45  
6 or not. I take it for granted that you did turn it over. I'm  
7 saying do any of that material in your view contain exculpatory  
8 evidence?

9 MR. SEBASTIAN: So the material that I personally  
10 viewed I do not believe had exculpatory evidence within it. 02:45

11 THE COURT: And those include the notes that we've  
12 been talking about, the handwritten notes, correct?

13 MR. SEBASTIAN: That's correct.

14 THE COURT: So your argument is basically saying that  
15 those documents may yet exist at Google and might be obtainable 02:45  
16 by the defendant, at least some of them, except for three  
17 categories?

18 MR. SEBASTIAN: Some material can. There's three  
19 domains that Google say are not there. But I don't know  
20 what -- this response came in 2021. 02:45

21 THE COURT: Right.

22 MR. SEBASTIAN: So I don't know if it's still there.

23 THE COURT: Right.

24 MR. SEBASTIAN: And the Government was under no  
25 obligation to issue search warrants to seize all of that data. 02:46

1                   THE COURT: Okay. Do you have any other responses  
2 that you haven't told me about?

3                   MR. SEBASTIAN: So in terms here with the exculpatory  
4 evidence, the Government -- or the defendant has failed to meet  
5 his burden. He fails to show the Government's knowledge that  
6 any of this material was exculpatory, and he ignores the fact  
7 that not only did the Government collect and preserve the  
8 material that it received, but it turned all that over.

9                   THE COURT: Well, let's stop there, though. He has a  
10 declaration in which he says "these documents existed" and  
11 "they were exculpatory" and "they were taken by the  
12 Government." If that is true, any knowledge of such documents  
13 would be imputed to the Government because the Government took  
14 them.

15                  MR. SEBASTIAN: And if the material was there, the  
16 Government turned it over if the Government took it.

17                  THE COURT: So you're saying everything the  
18 Government took --

19                  MR. SEBASTIAN: We turned over everything.

20                  THE COURT: So there was nothing that the receiver  
21 obtained post-receivership which was not turned over and was  
22 destroyed?

23                  MR. SEBASTIAN: There is a difference there.

24                  THE COURT: Okay.

25                  MR. SEBASTIAN: So the receiver is not the

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02:47

1 Government. The receiver is --

2 THE COURT: I understand that.

3 MR. SEBASTIAN: -- a Court-appointed agent. We --  
4 the Government, the DOJ postal, received information from the  
5 receiver and turned that over. Now, I can clarify that point  
6 in that the material turned over to the DOJ occurred in 2018  
7 through 2020. Right? The order to destroy that data was  
8 anything remaining within the receiver's custody. But our  
9 understanding is everything that the FTC and the receiver  
10 collected was turned over to us when we issued our request.

02:47

02:47

11 THE COURT: So that phrase, "anything remaining in  
12 the receiver's custody," you take that to mean that those would  
13 be materials that were already turned over to you?

14 MR. SEBASTIAN: So a second set of data, right? So  
15 if there's two sets of data --

02:47

16 THE COURT: Who received data?

17 MR. SEBASTIAN: -- the receiver collected one set and  
18 the Court ordered the receiver to destroy its set. But DOJ was  
19 not ordered to destroy that data. So whatever DOJ collected  
20 was turned over. Now, I can't --

02:48

21 THE COURT: What do you make of the argument that  
22 since there was at least the possibility of a criminal  
23 prosecution coming, that the Government should have intervened,  
24 somehow objected to the destruction of the evidence by the  
25 receiver?

02:48

1 MR. SEBASTIAN: So the defendant was on notice that a  
2 criminal -- that information could be turned over to the  
3 Government. It was on the defendant to either plead the Fifth  
4 and not turn over that documentation at that time --

11 MR. SEBASTIAN: So I think there's difficulty in  
12 saying that, Your Honor, because that's -- first, you're  
13 saying -- let me actually ask you this question. So are you  
14 asking why we didn't ask the receiver not to destroy or why we  
15 didn't inform the Court?

16 THE COURT: Ask the Court to order the receiver not  
17 to destroy it.

18 MR. SEBASTIAN: So we received copies of information,  
19 and so our understanding is that material relevant to the  
20 investigation was turned over and we were going to produce that  
21 material in the criminal investigation. The civil was its own  
22 investigation, and the material that we collected was separate.  
23 So whatever occurred in that civil case, that was its own case,  
24 whereas we had our criminal investigation, which was completely  
25 separate, collected copies of material, retained those

1 copies --

2 THE COURT: By the time the receiver destroyed the  
3 allegedly exculpatory evidence, there was an active criminal  
4 investigation?

5 MR. SEBASTIAN: Yes.

02:49

6 THE COURT: Okay. So why didn't the Government again  
7 ask the Court not to order the receiver to destroy potentially  
8 exculpatory evidence? Was the criminal division aware that  
9 there was such an order?

10 MR. SEBASTIAN: Could you give me one second, Your  
11 Honor?

02:49

12 THE COURT: Yes.

13 (Government counsel confer.)

14 MR. SEBASTIAN: Your Honor, the Government's -- the  
15 DOJ's criminal investigation was separate from the civil  
16 investigation, and so our understanding is the criminal  
17 investigation collected the material relevant to its charged  
18 conduct, collected all of the material relevant to it. That  
19 material was turned over. The material that the receiver was  
20 ordered to be destroyed was material relevant to the civil  
21 investigation. Completely separate, two different parties.

02:50

22 None of it was --

23 THE COURT: There was a large overlap between the  
24 civil investigation and the -- with the criminal investigation,  
25 that it's still the alleged defrauding of potential customers,

02:51

1 correct?

2 MR. SEBASTIAN: Well, it's two different things. So  
3 the civil investigation was looking to the defendant's false  
4 advertising and claims made to consumers. The criminal  
5 investigation is analyzing a small portion of it. It's a 02:51  
6 four-month -- the charged conduct is four months of credit card  
7 fraud where consumers were being charged without their consent,  
8 and the defendant was going through old orders and just putting  
9 through credit card charges. And then the next part of the  
10 criminal investigation is based on the document destruction and 02:51  
11 witness tampering associated with the CID. They're two  
12 separate and distinct investigations, and they were looking at  
13 two different things.

14 THE COURT: Well, I mean, I think there's some  
15 overlap in relevance between -- as to some documents may be 02:51  
16 relevant to both investigations. It seems that that's  
17 potentially the case.

18 But in any event, we still haven't -- so your answer  
19 to the question of why didn't the Government ask the Court to  
20 not direct the receiver to destroy documents was because there 02:52  
21 were two separate investigations, and the civil investigation  
22 did not feel that that was appropriate because it was  
23 concluded, the civil investigation was concluded, and did -- to  
24 the extent that it was a separate criminal investigation, did  
25 the people conducting the criminal investigation, were they 02:52

1 aware that there was an order to destroy the documents by the  
2 receiver?

3 MR. SEBASTIAN: So the criminal team was aware of the  
4 order. That order was forwarded to it by the FTC.

5 THE COURT: Okay.

02:52

6 MR. SEBASTIAN: But that was a completely different  
7 case, and the civil components acted separately from the  
8 criminal components.

9 THE COURT: I understand. So let's go on to the next  
10 issue, which is --

02:52

11 Do you want to respond to that?

12 MS. POTASHNER: Your Honor, may I just point out one  
13 thing? Because I think it will get to the meat of the matter  
14 in terms of --

15 THE COURT: Yes.

02:53

16 MS. POTASHNER: -- what Your Honor was asking. If  
17 the Court were to look at Exhibit 87, that's actually an email.

18 THE COURT: An email between who?

19 MS. POTASHNER: This looks better on TV than in real  
20 life. So if I could describe what it is for Your Honor. That  
21 email is an email that is dated September 14th, 2022, from the  
22 FTC to DOJ, and it's advising -- it is advising DOJ that the  
23 receiver is requesting permission to destroy the evidence. And  
24 it's specifically flagging in that email the destruction of  
25 evidence subparagraph. And so the FTC is expressly saying to

02:53

1 DOJ, "we just want to flag this for you that this is  
2 happening." I would take issue with it being completely  
3 separate, and I'm sure Your Honor is going to want to go into  
4 that a little bit later. But just in terms of what the DOJ  
5 knew, the DOJ knew of that request before it was ordered. It 02:54  
6 wasn't a completely separate situation where the DOJ learned  
7 about it after the fact. And so I just want to make sure that  
8 the record is quite clear that the FTC gave DOJ advanced notice  
9 of that request by the receiver before it was ever ordered by  
10 the Court. 02:54

11 THE COURT: Understood. And what's your response to  
12 the argument by the Government here, that whatever was  
13 remaining with the receiver was just a duplicate of material  
14 that was already produced, and, therefore, there was nothing  
15 new -- well, whatever was destroyed was already produced in the 02:54  
16 hands of the defendant?

17 MS. POTASHNER: Your Honor, I keep -- in my brain I  
18 keep -- I keep hearing the phrase *you know, we're the*  
19 *Government, just trust us*, and the Government is just saying  
20 *that it's our understanding, it's our belief, it's our* -- but 02:54  
21 there is no evidence to that fact, that the entire receiver's  
22 file was copied and given to the Government. There's just no  
23 evidence of that. There's no declaration in real time saying  
24 it. There's just -- there's no information that the Government  
25 has put before Your Honor in anticipation of this motion to 02:55

1 actually prove that fact. And we --

2 THE COURT: So let's go to that point.

3 Mr. Sebastian, it would have been easy for you to  
4 contact the receiver and get a declaration in saying well,  
5 *whatever I destroyed had already been produced. It was just a* 02:55  
6 *copy of the material that was already existing in the hands of*  
7 *the Government. I didn't see any such declaration in your*  
8 *opposition.*

9 MR. SEBASTIAN: Your Honor, I don't think the 02:55  
10 Government had an obligation to go seek out as much evidence as  
11 it could to find something exculpatory. Right?

12 THE COURT: Not even after -- well, I mean, I guess  
13 you couldn't do it after the reply and the declaration by the  
14 defendant that there was actually exculpatory evidence in the  
15 description of that. 02:56

16 MR. SEBASTIAN: So the receivership currently is  
17 defunct and so -- but there is possibility to speak with  
18 someone at the receivership entity itself. But just to clarify  
19 before, Your Honor, I didn't say that we never received notice  
20 of the destruction. 02:56

21 THE COURT: I --

22 MR. SEBASTIAN: We were notified. We received the  
23 email.

24 THE COURT: Yeah, I understand that.

25 MR. SEBASTIAN: We didn't feel that we had a duty to 02:56

1 go and try to preserve all of the evidence. In fact, there was  
2 so much material sitting there, where would we even store that?  
3 The Government doesn't have the obligation to go there and take  
4 boxes of material and store it anywhere. The reason for the  
5 destruction was because Mr. Cardiff didn't pick up the material  
6 and the receivership was wasting money storing that. 02:56

7 THE COURT: He was not allowed to have it, so it had  
8 to be destroyed.

9 MR. SEBASTIAN: So he wasn't allowed to have consumer  
10 data, right? It's not all data. It's just consumer data that  
11 he wasn't permitted to have. So he went and collected 37 boxes  
12 of other material, right? 02:56

13 So -- and another couple of notes, when we're talking  
14 about the Nest Cam footage, for example, there's 14,000  
15 still-frame images of Nest Cam footage, but there was no video  
16 within that material. There was one 25-minute video taken  
17 December 2016 of a -- of one room where they were packaging  
18 material, but there were no other videos. So the fact that  
19 that one video from 2016 existed and that there were 14,000  
20 screenshots of images that came from the cameras but no actual  
21 video goes back to our point where the Nest Camera footage,  
22 there was only a ten-day subscription that was paid for. So  
23 that material wouldn't have been sitting on the Google account  
24 in October of 2016 when these calls and the charge conduct  
25 occurred January through May of 2018. And the defense is 02:57

1 arguing that this material could have been downloaded and saved  
2 to the Google account. But we believe that that's contrary to  
3 the facts because if the 14,000 picture images are there, then  
4 the video should have been there if they existed.

5 THE COURT: Okay. Understood. All right. Let's now 02:58  
6 go to the second point, which is the overlap and presumably  
7 joint criminal and civil investigations which the defendant  
8 argues violated his Fourth Amendment and due process rights.

9 So as the parties are well aware, this required --  
10 requires, in essence, a finding of bad faith. The fact that 02:58  
11 there were concurrent civil and criminal investigations that's  
12 done by itself highlight any bad faith or any impropriety on  
13 behalf of the Government. Also, the Government makes the  
14 argument that, in fact, there was -- the civil investigation  
15 was not a pretext to obtain incriminating evidence. Since the 02:58  
16 civil investigation was protracted, the Government actually  
17 obtained summary judgment on 16 of the claims, so it cannot be  
18 really a pretext. And they cite some case law that says that  
19 when there is sort of a pursuit of the civil investigation and  
20 civil action to judgment, it's very rare to find bad faith 02:59  
21 since there was an independent reason to continue with that  
22 action apart from obtaining any evidence which would  
23 potentially be relevant to the criminal matter.

24 So how do you address that, Ms. Potashner?

25 MS. POTASHNER: Your Honor, I don't think that the 02:59

1 conclusion that there was a -- there was a finding in favor of  
2 the Government in the civil case obviates this entire issue. I  
3 think that when you look at *Kordel*, *Kordel* lists a number of  
4 different ways and examples that the Court should look to to  
5 determine whether there's bad faith. We agree that there can 03:00  
6 be simultaneous investigations on the civil and criminal side;  
7 however, this is not just merely a simultaneous investigation.  
8 When you look at the *Kordel* case, it really distills down to --  
9 and I have the different examples that it gives. One example  
10 is conducting a covert criminal investigation under the guise 03:00  
11 of a civil action. That's one of the examples that there would  
12 be bad faith. Another is engaging in deceit or affirmative  
13 misrepresentation regarding the true purpose of the  
14 investigation. And here I believe we have that, even if we set  
15 aside the first -- the first *Kordel* factor based on the fact 03:00  
16 that there was ultimately a finding in favor of the Government  
17 on the civil side. But we do have affirmative  
18 misrepresentations here.

19 We also have that Mr. Cardiff was not represented at  
20 the start of the civil case. That is another factor that 03:00  
21 *Kordel* tells us to look at. And most importantly, I think, is  
22 the catchall factor, which is whether or not the Government  
23 engaged in conduct that qualifies as special circumstances that  
24 might suggest the unconstitutionality or impropriety of the  
25 criminal prosecution. I think that's exactly what we have here 03:01

1 because I think when the Court reviews *Kordel*, what the Court  
2 will find is that *Kordel* is looking at whether or not the  
3 Government has gained an unfair advantage by the jockeying of,  
4 you know, the criminal and the civil investigation unbeknownst  
5 to the defendant. And that's the question here. Did the 03:01  
6 Government in this particular case obtain an unfair advantage?  
7 The answer is yes, it did. The answer is, you know, first, the  
8 Government says well, you know, the *CID* case came first, the  
9 criminal -- and so that came first before the criminal  
10 investigation, but when you scratch the surface, that's not 03:01  
11 actually true. The *CID* case was not against Mr. Cardiff. It  
12 was against Redwood. And so really the criminal investigation  
13 started.

14 And what we know from the specific facts here is that  
15 the USPIS agent went to Redwood, Mr. Cardiff's place of 03:02  
16 business, and tried to obtain access to it. And that happened  
17 in the summer of 2018. She tried multiple times. She then  
18 started -- and I can go back, and I think it's probably worth  
19 doing -- the coordination that occurred well before the civil  
20 case was ever filed. And so we have USPIS and the FTC 03:02  
21 conducting a joint investigation before there's ever even a  
22 civil case.

23 The civil case is then filed in October of 2018, and  
24 Mr. Cardiff has no counsel. The Government selects within days  
25 of that filing a receiver that has worked closely with the 03:02

1 Government, FTC, and DOJ in promoting criminal investigations.  
2 That's -- that's the person that was selected by the Government  
3 and put forward to the Court and the Court accepted because the  
4 Court really didn't have the full information of what was going  
5 on behind the scenes. When the receiver was suggested to the 03:03  
6 Court and approved by the Court, the Court wasn't told *oh,*  
7 *there's also a criminal investigation happening here. Oh,*  
8 *there's already been coordination between the USPIS agent and*  
9 *the FTC.* None of that information was surfaced for the Court.  
10 So the Court, of course, presumably took it at face value. 03:03  
11 This is a receiver. It's an appropriate receiver who's going  
12 to be doing appropriate work.

13 Then, the Government started immediately with this  
14 receiver that was known to the Government and orchestrated a  
15 warrantless search within days of the receiver being appointed. 03:03  
16 This is outside the scope of what the receiver was appointed as  
17 a Court-appointed receiver to do. This was something that was  
18 behind the scenes secretly done by the Government.

19 THE COURT: Didn't the civil Court allow the receiver  
20 to take sort of immediate access or have immediate access to 03:04  
21 the business and its premises?

22 MS. POTASHNER: Of course, Your Honor. And the Court  
23 went further to say --

24 THE COURT: So how was it outside what the receiver  
25 was supposed to do? 03:04

1 MS. POTASHNER: Because the -- because, Your Honor,  
2 the receiver was permitted to take actions in order to protect  
3 the business and to -- and to make sure that the assets weren't  
4 dissipated. That was the goal of the receiver and that's why  
5 the receiver was appointed. The receiver was also granted  
6 permission to work with -- to -- 03:04

7 THE COURT: Accommodate or consider any reasonable  
8 request by law enforcement agents.

9 MS. POTASHNER: And I think that the key word there  
10 is "reasonable," Your Honor. Reasonable to what end? 03:04  
11 Reasonable to the end of the stated purpose of the receiver.  
12 That's not what happened here. What happened here -- although  
13 the Government tries to recast it as USPIS was there just to  
14 keep the peace while the receiver took possession of the  
15 business, common sense dictates that's not true. There was 03:05  
16 local law enforcement there for keeping the peace. USPIS was  
17 there because they had already planned for USPIS to have a  
18 complete warrantless search. And those were conversations that  
19 predated the filing of the civil case, conversations that  
20 predated the request for the receiver, and conversations that 03:05  
21 were effected and resulted in an extensive warrantless search  
22 of the premise outside of the knowledge of the Court, outside  
23 the knowledge of Mr. Cardiff, who was unrepresented at that  
24 time. That's the second -- that's the second example of the  
25 unfair advantage. 03:05

1                   This is not an ordinary, simultaneous, or parallel  
2 prosecution on the civil side and criminal side. This is  
3 highly orchestrated. And the Government's attempt to recast it  
4 just cannot be accepted by this Court. When you look at the  
5 number, and we stopped counting at 710, but 710 communications  
6 between the civil and criminal side with the Government. 710.                   03:06  
7 If you put that in a two-year period, that would be literally a  
8 daily communication. And all we had was the written  
9 communication. We didn't have the telephone calls; we didn't  
10 have the Zooms; we didn't have the Teams; we didn't have  
11 anything that wasn't provided to us in discovery.                   03:06

12                   So it's fair to say that that is probably a limited  
13 subset of the amount of coordination happening. And we see the  
14 coordination right at the beginning. That's an unfair  
15 advantage. The Government was using the civil case in order to  
16 circumvent the Fourth Amendment and in order to disregard  
17 Mr. Cardiff's constitutional rights in order to get in there.  
18 That was not the role of the receiver; that was not why the  
19 receiver was appointed by the Court; and that certainly was not  
20 the stated reason or one of the stated reasons that the  
21 Government was seeking a receiver in the first place. This was  
22 all kind of a covert operation behind the scenes. That is an  
23 unfair advantage.                   03:07

24                   THE COURT: Let me hear from the Government.

25                   MR. SEBASTIAN: Sir, Your Honor, I think the Ninth                   03:07

1 Circuit in the *Stringer* case is really on point here. As the  
2 Government has stated before, August 2017 a CID was issued.  
3 The defendant keeps going on about a civil action that occurred  
4 in 2018, but there is no need for a civil action to actually  
5 have started. It has to be that a civil investigation predated 03:07  
6 the criminal investigation and a civil investigation predated,  
7 if we go off of this 2018 date, over a year before. So the  
8 FTC, because of consumer complaints, is looking at the  
9 defendant, sends him a CID, and requests information.

10 This -- under *Stringer*, the fact that the FTC 03:07  
11 investigation predates the criminal investigation negates the  
12 likelihood of any bad faith. And under Unruh, no bad faith  
13 exists if the civil investigation culminates in a civil  
14 lawsuit. Not only did this culminate in a civil lawsuit, the  
15 FTC won a summary judgment on 16 different counts. So this 03:08  
16 was -- the receiver is now put into place because of  
17 misconduct. And this entire argument that the -- there's an  
18 unfair advantage because of secrecy is ridiculous because a  
19 grand jury investigation is secret. *Stringer* clearly says that  
20 whether an investigation is overt or covert depends on the 03:08  
21 Government's discretion. And most investigations are covert  
22 because defendants, like this defendant, will destroy documents  
23 when the Government is looking into them, just like what  
24 occurred here.

25 So these arguments -- the argument that he's not 03:08

1 represented at the start of the civil case: incorrect. Tracy  
2 Green represents Cardiff and Redwood for the August 2017 CID.  
3 Her web page clearly states that she represents defendants for  
4 white-collar defense.

5 This entire argument regarding USPIS being involved, 03:09  
6 there was six postal agents, two local law enforcement. They  
7 came in to assist the receiver in taking over a location. It's  
8 two different locations on two separate sides of a parking lot  
9 with two different buildings. So two law enforcement is not  
10 enough one-on-one to go to a company with 25 employees and the 03:09  
11 defendant. So they split up law enforcement to go in and  
12 ensure access.

13 When we talk about a warrantless search, that's also 03:09  
14 ridiculous because the receiver in October writes an entire  
15 report. When the receiver walks into the location, he finds an  
16 entire storage room full of mailing -- mailing papers. These  
17 papers indicate that the defendant is sending letters from a  
18 master prophet to the elderly. And the receiver then reports  
19 that there's \$1.5 million in donations collected. And so for  
20 the receiver to see this material and then allow postal to come 03:10  
21 in and take pictures is not ridiculous. It's something within  
22 the receiver's purview because the receiver is put into place  
23 because the defendant is committing misconduct. And when he  
24 walks into the location, sees the misconduct, he allows postal  
25 to then come back at a different time and collect the material 03:10

1 that's relevant.

2 THE COURT: What do you make of the voluminous or  
3 repeated communications between the civil CID people and the  
4 criminal investigation people --

5 MR. SEBASTIAN: Sure.

03:10

6 THE COURT: -- over a period of time?

7 MR. SEBASTIAN: So there's 710 communications that  
8 the Government was not obligated to disclose that we  
9 voluntarily turned over. In all of these communications, there  
10 is not one instance of misconduct or showing the intertwining  
11 under *Scrushy*. The defendant uses *Scrushy* as their main case.  
12 In *Scrushy* the SEC not only set the dates and times and  
13 locations of depositions, they were also heavily involved.  
14 Here the FTC conducted their own, and the Government  
15 interviewed over 35 witnesses completely separate from the FTC.  
16 The FTC was not at any of the interviews and was not involved.  
17 And DOJ was not involved in any of the FTC interviews.  
18 Completely separate.

03:10

19 Communications between the two agencies are actually  
20 typical. And under *Stringer*, it says that the agencies can go  
21 back and forth and communicate. That organization or  
22 communication is not something that shows bad faith. Bad faith  
23 is an affirmative misrepresentation which involves trickery.  
24 And during the defendant's deposition, his attorney clearly  
25 asked the FTC attorney whether or not they were talking to

03:11

03:11

1 prosecutorial authority. And the FTC attorney states, "From  
2 time to time we share information with Government agencies, and  
3 those communications with Government agencies may be civil or  
4 criminal and are confidential, and we cannot disclose them."

5 THE COURT: All right, then. Very well. 03:11

6 I'll have you get the last word, Ms. Potashner.

7 MS. POTASHNER: Thank you, Your Honor. The one thing  
8 that I wanted to point out is that the Government just  
9 indicated that the receiver in his due diligence went in after  
10 the receivership was -- was approved by the Court and went in  
11 and saw materials that caused him concern and brought in the  
12 U.S. Postal. That is just not correct. There is an indication  
13 now, just to remind the Court -- 03:12

14 THE COURT: The U.S. Postal Service people were there  
15 before the receiver saw that material. 03:12

16 MS. POTASHNER: That is true. And there's also an  
17 indication on September 26th where the FTC is emailing U.S.  
18 Postal assessing her availability, the postal agent's  
19 availability regarding access and entering Redwood. So it is  
20 not correct that the -- that the receiver was surprised by what  
21 he saw and then it made sense to bring in U.S. Postal after  
22 that. That is just -- that is -- that is a reversal of the  
23 order that things happened here. The -- there was a plan by  
24 FTC and U.S. Postal to get in and search that property, and the  
25 receiver was a vehicle for that search that was used by the 03:13

1 Government, plain and simple based on the evidence and the  
2 communications.

3 And I appreciate that the Government, you know, says  
4 that the Government didn't have to provide this information to  
5 us. I appreciate the Government providing that information, 03:13  
6 but it doesn't undermine the truth of the matter, which is that  
7 the civil case was used as a vehicle to do this criminal  
8 investigation.

9 And I do think it is important that the CID case that  
10 the Government is relying on was not a case against 03:13  
11 Mr. Cardiff. It wasn't. It was a case against Redwood. I  
12 understand it's related, but it was not a case against  
13 Mr. Cardiff. And Mr. Cardiff was not represented at the front  
14 end of the civil case. That's on the docket. The Court can  
15 take judicial notice of when a -- when the lawyer came into 03:13  
16 that case.

17 THE COURT: Thank you.

18 Thank you, counsel. The matter stands submitted. I  
19 expect to issue a ruling by the end of the week.

20 (Proceedings concluded.) 03:14

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